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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 415

FOREMAN'S ASSOCIATION OF AMERICA, PETITIONER

v.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below setting aside a portion of the Board's order (R. 322-333) is reported in 169 F. 2d 571. The prior decree of the court below, enforcing the Board's order (R. 321), is reported at 162 F. 2d 461. The order of this Court, denying certiorari in part and granting certiorari in part, vacating the portion of the decree below as to which certiorari was granted

and remanding to the court below is reported in 332 U. S. 840. The decision and order of the Board (R. 53-58) is reported in 65 N. L. R. B. 612.

JURISDICTION

The judgment of the court below, following the remand from this Court, was entered on August 16, 1948 (R. 322). The petition for a writ of certiorari was filed on November 13, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and 28 U. S. C. 1651.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. I) 141, *et seq.*) are set forth in the Appendix, *infra,* pp. 10-16.

QUESTION PRESENTED

Whether Sections 2 (3), 2 (11), and 14 (a) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, which exclude individuals employed as supervisors from the term "employee" as used in the Act, violate the Fifth Amendment to the Constitution of the United States.

STATEMENT

Following the usual proceedings under the National Labor Relations Act, the Board, on January 30, 1946, issued its decision and order, directing,

inter alia, that the Edward G. Budd Manufacturing Company "Cease and desist from: (a) Discouraging membership in the Foreman's Association of America * * *; (b) In any other manner interfering with, restraining, or coercing its supervisory employees in the exercise of [their rights] * * * as guaranteed in Section 7 of the Act" (R. 55). This order was enforced by the court below in a decree entered June 3, 1947, "on the authority of" *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485 (R. 321). On June 23, 1947, Congress enacted the Labor Management Relations Act, 1947, amending the provisions of the National Labor Relations Act. The Budd Company thereafter filed a petition for a writ of certiorari (No. 301, October Term, 1947), relying on the changes which the new Act made in the law with respect to supervisory employees. The Foreman's Association petitioned for leave to intervene to urge the unconstitutionality of the new Act. This Court granted the petition to intervene, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership in the Foreman's Association of America," and remanded the cause to the court below "for consideration of the effect of the Labor Management Relations Act of 1947 * * * on the question to which the grant of certiorari is limited." *Ed-*

ward G. Budd Manufacturing Co. v. *National Labor Relations Board,* 332 U. S. 840.

In response to the mandate of this Court, the court below considered both the effect of the new Act upon the Board's order and the grounds advanced by the Foreman's Association assailing the constitutionality of the new Act. The court held that "The cease and desist provisions of the Board's order would enjoin the respondent from engaging in conduct [interference with foremen's union activity] in the future which is now lawful. They should, accordingly, be set aside" (R. 333). The court upheld the constitutionality of the new Act with respect to each of the several grounds upon which it was attacked (R. 328-332).

ARGUMENT

The judgment of the court below, upholding the constitutionality of Sections 2 (3), 2 (11) and 14 (a) of the Labor Management Relations Act of 1947, is clearly correct and does not conflict with the decision of any other court of appeals.[1]

---

[1] The provisions of the amended Act with respect to supervisors were considered by the courts in *National Labor Relations Board* v. *Brown and Sharpe Mfg. Co.*, 169 F. 2d 331 (C. C. A. 1) and *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board,* 163 F. 2d 905 (App. D. C.), certiorari denied, *sub. nom. Foreman's Association of America* v. *L. A. Young Spring & Wire Corp.*, 333 U. S. 837. The constitutionality of these sections was impliedly upheld by the courts of appeals in the *Young* and *Brown* cases, and was expressly but unsuccessfully challenged by the present petitioner in its petition for a writ of certiorari in the *Young* case, which raised questions substantially similar to those presented in the petition in this case.

There is, therefore, no occasion for review by this Court.

1. Petitioner argues that the new Act deprives foremen of due process of law, contending that it precludes them from asserting their constitutional right to organize and bargain collectively not only before the National Labor Relations Board but also before state labor relations boards and before the courts (Pet. 13-17). Petitioner concedes that Congress could withdraw the remedies provided in the original National Labor Relations Act (Pet. 11-12), but contends that Congress cannot constitutionally withdraw from supervisory employees the protection afforded their right to organize and bargain collectively by state labor relations boards and by state and federal courts. This question is not properly before this Court because the decree below was a remedy provided in the original National Labor Relations Act. Whether Congress could or could not constitutionally deprive state or federal courts of power to protect foremen in the exercise of their right to organize and bargain collectively cannot be decided in this case.

Petitioner's reliance upon such cases as *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682, and *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 426-432 (Pet. 9, 16-17), dealing with deprivations of property without opportunity for judicial review, or *Truax* v. *Corrigan,* 257 U. S. 312, 330, 332

(Pet. 9, 16-17, 23), dealing with the denial of recourse to the courts for the defense of common law or equitable rights, is based on the assumption that it may here try the validity of that portion of Section 14 (a) of the Act as amended, which petitioner interprets as depriving all federal and state courts of jurisdiction to protect foremen in their organizational rights. Since, as petitioner concedes (Pet. 11-12), Congress could withdraw the remedies of the National Labor Relations Act from foremen, such cases have no relevance here. Equally inapposite are *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks,* 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, likewise relied on by petitioner, for those cases dealt with the enforcement of statutory commands here absent. See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 300-301.

2. Petitioner here renews the contention, unsuccessfully advanced in its petition for a writ of certiorari in *Foreman's Association of America* v. *L. A. Young Spring & Wire Corp.,* 333 U. S. 837, that the exclusion of supervisors from the definition of "employee" is so discriminatory as to be an abuse of legislative power and therefore violative of the Fifth Amendment (Pet. 17-24). Congress can, for its purposes, set up classifications of persons and differentiate in the treatment of the various classes, so long as all persons within each class are treated alike. Thus, Congress in the

Social Security Act (42 U. S. C. 409, 1107) exempted and excepted certain classes of persons from the operations of the statute, such as agricultural, charitable, domestic and educational employees and employees of employers employing less than eight persons, and this Court has upheld such differentiation of treatment. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509-513; *Helvering* v. *Davis,* 301 U. S. 619, 646; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584-585. Similarly, exemptions such as administrative, agricultural, and professional employees, outside salesmen, seamen, fishermen, and employees of certain small newspapers, under the Fair Labor Standards Act (29 U. S. C. 213) have been held to be valid. See *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, 184. It is therefore evident that Congress, within its constitutional power to regulate commerce, could include supervisors as employees under the Act, *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, or exclude them as it has by the recent amendments. As this Court stated in the *Packard* case, "it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms" 330 U. S. at 490.[2] See also *Wickard* v. *Filburn,* 317

[2] When the *Packard* case was being considered, no one argued that the position subsequently taken by the minority of this Court would be unconstitutional. Nor did the Board, in grappling with the problem of the interpretation of "employee" under the original Act, ever consider that any constitu-

U. S. 111; *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Cases* v. *United States*, 131 F. 2d 916 (C. C. A. 1), certiorari denied *sub nom. Velazquez* v. *U. S.*, 319 U. S. 770; *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.)

In disposing of an analogous contention under the Fifth Amendment in *Currin* v. *Wallace*, 306 U. S. 1, 14, this Court noted that "There is no requirement of uniformity in connection with the commerce power," and continued:

> It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

Here Congress did "consider and weigh relative situations and needs" and concluded that the

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tional issue might be involved. *Matter of Union Collieries Coal Co.*, 41 N. L. R. B. 961 and 44 N. L. R. B. 165; *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733; *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4. For a detailed report of the Board's considerations of the supervisor problem, see *Tenth Annual Report of the National Labor Relations Board*, 1945, pp. 30-34.

"real balance of power in the collective-bargaining process" might be upset if labor organizations were permitted to continue invoking the Act "for covering supervisory personnel, traditionally regarded as part of management." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 3-4. Accordingly, petitioner's attempt ~~to~~ to have this Court inquire into the reasonableness of, and the necessity for, Congress' action in excluding supervisors must fail.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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DECEMBER 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et. seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

3. The term "employee" shall include any employee, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the

circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. (Supp. I) 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 10. * * * (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question

occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals

of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this

Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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